GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 17214 of Advisory Neighborhood Commission 6A, pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of the Zoning Administrator of the Department of Consumer and Regulatory Affairs. Appellant alleges that the Zoning Administrator erred by issuing a certificate of occupancy permit (No. C76349, dated May 19, 2004) for a 30-seat deli/restaurant. Appellant argues that the actual use of the business is a fast food restaurant as defined by § 199, and regulated by § 733. The C-2-A-zoned premise is located at 721 H Street, N.E. (Square 890, Lot 69).

HEARING DATE: October 12, 2004
DECISION DATE: November 2, 2004

ORDER

PRELIMINARY MATTERS

Advisory Neighborhood Commission ("ANC") 6A ("Appellant") filed this appeal on July 9, 2004, alleging that the Zoning Administrator ("ZA") of the Department of Consumer and Regulatory Affairs ("DCRA") erred in issuing Certificate of Occupancy No. C76349. The certificate of occupancy was issued on May 9, 2004 to "Chans Food, Inc." for a "restaurant." Appellant contends that the establishment for which the certificate of occupancy was issued is, in reality, a "fast food restaurant," as that use is defined by the Zoning Regulations, and not a "restaurant," which is defined differently by the Regulations. If a restaurant, the establishment is a matter-of-right use in this C-2-A zone, but if a fast food restaurant, it requires a special exception.

The subject property is located across the street from the boundary of ANC 6A, the Appellant herein, but is located within ANC 6C, which filed a letter in support of the appeal, as did the Capitol Hill Restoration Society.

The Board heard the appeal on October 12, 2004. The Appellant and DCRA participated in the hearing, as well as a representative of Chans Foods and the lessee of the property.

At its November 2, 2004 decision meeting, the Board decided to grant the appeal by a vote of 5-0-0.

FINDINGS OF FACT

1. On May 19, 2004, DCRA issued Certificate of Occupancy No. C 76349 to "Chans Foods, Inc." for a "restaurant" at the property which is the subject of this appeal ("subject property.")

2. The certificate of occupancy incorrectly noted the address of the subject property. It also incorrectly noted the zone district within which the subject property is located as C-4, in which a fast food restaurant is a matter-of-right use. *See,* 11 DCMR § 751.2[1].

3. Even after correcting the zone district reflected on the certificate of occupancy to C-2-A, DCRA re-issued the certificate of occupancy for a restaurant, which is also a matter-of-right use in a C-2-A zone. *See,* 11 DCMR § 721.1.

4. A fast food restaurant is not a matter-of-right use in a C-2-A zone, but requires a special exception. *See,* 11 DCMR § 733.

5. The Zoning Regulations deem any restaurant with a drive-through a fast food restaurant. *See,* 11 DCMR § 199.1 (definition of "Restaurant, fast food).

6. The establishment at the subject property does not have a drive-through.

7. The Zoning Regulations list three other characteristics, the existence of two of which denote an establishment as a "fast food restaurant," as opposed to a "restaurant." These are: (1) whether at least 10% of the total floor space on any one floor that is accessible to the public is allocated and used for customer queuing for self-service for carry out and on-premises consumption, (2) whether at least 60% of food items are already prepared or packaged before a customer places an order, and (3) whether or not the establishment primarily serves its food and beverages in disposable containers and provides disposable tableware. *Id.*

8. The Zoning Regulations' definition of "restaurant" specifically excludes a fast food restaurant from the definition.

9. The queuing area in the establishment at the subject property, when calculated against the publicly accessible floor space, is approximately 231.8 of 907 square feet, or 25.6%. If the queuing area is calculated against the total floor space, it encompasses approximately 231.8 of 1521.1 square feet, or 15.2%. Either way, the queuing area takes up more than 10% of the floor area within the establishment.

---

[1]These errors led to some confusion early on, but they were subsequently corrected, and, at this point, have no bearing on the determination of this appeal.

10. Approximately 10 – 15% of the food items offered by the establishment at the subject property are prepared or packaged before a customer places an order.
11. The establishment at the subject property primarily serves its food and beverages in disposable containers and provides disposable tableware.

CONCLUSIONS OF LAW

An appeal to the Board may be taken by any person aggrieved by a decision of a District official in the administration and/or enforcement of the Zoning Regulations, including the issuance of a certificate of occupancy. 11 DCMR §§ 3100.2 and 3200.2. The Board's regulations arise out of the authority and jurisdiction conferred upon it by D.C. Official Code § 6-641.07(f) (2001), in accordance with § 8 of the Zoning Act of 1938 (52 Stat. 797, 799, as amended.) For purposes of the Board's regulations, an ANC is considered a "person" which can be "aggrieved" by, and appeal, a decision of a District official in the administration and/or enforcement of the Zoning Regulations.

This appeal turns entirely on the interpretation of the § 199 definition of "Restaurant, fast food," and particularly on the parsing of the meaning of one sentence therein. Therefore, the relevant portion of the definition is set forth in its entirety below, with the pivotal sentence highlighted in boldface type. A fast food restaurant is defined as:

> [A] place of business devoted to the preparation and retail sale of ready-to-consume food or beverages for consumption on or off the premises. A restaurant will be considered a fast food restaurant if it has a drive-through. **A restaurant will be considered a fast-food restaurant if the floor space allocated and used for customer queuing for self-service for carry out and on-premises consumption is greater than ten percent (10%) of the total floor space on any one (1) floor that is accessible to the public**, and it exhibits one (1) of the two (2) following characteristics:
>
> (a) At least sixty percent (60%) of the food items are already prepared or packaged before the customer places an order; and/or
>
> (b) The establishment primarily serves its food and beverages in disposable containers and provides disposable tableware.

(Emphasis added.) 11 DCMR § 199.1.

The other definition relevant to this appeal is that of "Restaurant" itself, which specifically states that the term "restaurant," when used in the Zoning Regulations, "shall not include a fast food restaurant." 11 DCMR § 199.1. Therefore, if something is a fast food restaurant, based on the three criteria in the definition of fast food restaurant above, it cannot also be a "restaurant." This is an important distinction because restaurants are matter-of-right uses in all commercial zone districts, whereas fast food restaurants are

matter-of-right uses beginning only in C-2-B zones and continuing into the less restrictive commercial zone districts. Fast food restaurants are special exception uses in C-2-A zone districts, and therefore, must come before this Board. 11 DCMR § 733.

It was clear in the record that the establishment at the subject property primarily serves its food and beverages in disposable containers and provides disposable tableware, thereby meeting the last criterion, set forth in subparagraph (b), in the definition of fast food restaurant. (*See,* Exhibit No. 23). The only real question in this appeal is whether the floor space allocated and used for customer queuing for self-service for carry out and on-premises consumption is greater than ten percent (10%) of the total floor space on any one (1) floor that is accessible to the public.

At the hearing, the Chief of the Zoning Division of the Building and Land Regulation Administration ("BLRA") of DCRA testified that, to determine the percentage of floor space used for queuing, DCRA calculated "10 percent of the total area, of the gross floor area dedicated to that use or the leased space." Hearing Transcript, at 254, lines 11-17. As the hearing progressed, it became clear that DCRA interpreted the first criterion in the definition of fast food restaurant by reading the clause "accessible to the public" to modify the phrase "any one (1) floor." Therefore, DCRA determined its 10 percent calculation by taking 10 percent of the total floor space of *that floor that is accessible to the public*. In the subject establishment, there is only one floor and parts of that floor are accessible to the public, therefore DCRA made its 10 percent calculation against the floor area of the entire floor, including all areas accessible to the public and all areas that are not.

The Board, however, disagrees with DCRA's interpretation of the first criterion. The Board agrees with the Appellant that the clause "accessible to the public" modifies the phrase "ten percent (10%) of the total floor space on any one (1) floor." Reading the definition this way means that the 10 percent calculation is made against only the amount of floor space that is accessible to the public on a particular floor. Indeed, this is precisely the interpretation that DCRA itself gives the definition in the "Affidavit Eating Establishment" which DCRA had the lessee complete.[2] According to DCRA, this affidavit is completed whenever there is a question as to whether a restaurant-type use is appropriate in a particular zone district. Under the correct interpretation of the first criterion, the calculation would be 10 percent of the floor space *to which the public has access, i.e.,* including queuing area, seating area, hallways to restrooms, restrooms themselves, and the area immediately inside the front door. The area not accessible to the public would include, for example, the food preparation and storage areas and the area behind the service counter.

---

[2]DCRA's "Affidavit Eating Establishment" asks four questions derived directly from the definition of fast food restaurant in § 199. The second question is: "What percentage of the floor space *that is accessible to the public on any one floor* will be used for queuing for self-service for carry-out or on-premises consumption?" (Emphasis added.) This rendition of the question is consistent with the Board's interpretation of the first criterion.

DCRA also misinterpreted the first criterion to mean that only the customer queuing area must be more than 10 percent of a certain floor space. DCRA misread the phrase "queuing area" to mean both queuing area for carry out and queuing area for on-premise consumption. The Board disagrees and interprets the language to mean that the 10 percent calculation must be made including, as separate measurements, both the queuing area and the area for on-premise consumption. Simply put, if the total floor space for either customer queuing or on-premise consumption, or both, is more than ten percent of the total floor space that is accessible to the public on a particular floor, (and one of the other two criteria is met), then the establishment in question is a fast food restaurant.

As stated in Finding of Fact No. 9, when calculated against the publicly-accessible floor space within the establishment, the customer queuing area takes up approximately 25.6% of that space. As this is already well over 10 percent, the Board need not determine the separate measurement of percentage of floor space devoted to on-premise consumption. The establishment at the subject property meets the first and third criteria of the definition of fast food restaurant, and so falls within that definition. As it falls within that definition, it cannot be a "restaurant." Accordingly, DCRA erroneously issued C of O No. C76349 for a matter-of-right restaurant use.

For the reasons stated above, the Board concludes that the Appellant has met its burden of proof in demonstrating that DCRA erred in issuing Certificate of Occupancy No. C76349 for a matter-of-right restaurant use in a C-2-A zone district. Therefore, it is hereby **ORDERED** that this appeal be **GRANTED.**

VOTE: **5-0-0** (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr., John A. Mann, II, and Carol J. Mitten to grant.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member has approved the issuance of this Decision and Order

ATTESTED BY: _____
Jerrily R. Kress, FAIA
Director, Office of Zoning

FINAL DATE OF ORDER: JUN 13 2005

PURSUANT TO 11 DCMR § 3125.6, THIS DECISION AND ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES.

UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

LM/twr

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

★ ★ ★

BZA APPEAL NO. 17214

As Director of the Office of Zoning, I hereby certify and attest that on JUN 13 2005, a copy of the order entered on that date in this matter was mailed first class, postage prepaid or delivered via inter-agency mail, to each party and public agency who appeared and participated in the public hearing concerning the matter, and who is listed below:

Cody Rice
Chair, ANC 6A Economic Development
& Zoning Committee
310 9th Street, N.E.
Washington, DC 20002

Lisa A. Bell
Senior Counsel
D.C. Department of Consumer and Regulatory Affairs
941 North Capitol Street, N.E.
Washington, DC 20012

Chairperson
Advisory Neighborhood Commission 6A
Miner Elementary
P.O. Box 75115
Washington, DC 20013

Chairperson
Advisory Neighborhood Commission 6C
635 Massachusetts Ave., N.W.
P.O. Box 77876
Washington, DC 20013

H Street Community Development Corp.
501 H Street, N.E.
Washington, DC 20002

Corey Buffo
Acting Zoning Administrator
DCRA
Building and Land Regulation Administration
941 North Capitol Street, N.E., Suite 2000
Washington, DC 20009

Sharon Ambrose, Councilmember
Ward 6
1350 Pennsylvania Avenue, N.W.
Suite 102
Washington, DC 20004

Ellen McCarthy, Interim Director
Office of Planning
801 North Capitol Street, N.E.
4th Floor
Washington, D.C. 20002

Alan Bergstein
Office of the Attorney General
441 4th Street, N.W., 7th Floor
Washington, DC 20001

ATTESTED BY:

JERRILY R. KRESS, FAIA
Director, Office of Zoning